

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23215-8-III
)	
Respondent,)	
)	
v.)	Division Three
)	
STEVEN FRANK SHERER,)	
)	
Appellant.)	UNPUBLISHED OPINION

KULIK, J. — Steven F. Sherer solicited a former prison cell mate to burn down his mother-in-law’s house. Mr. Sherer moved to disqualify both the King County Prosecutor’s Office and the judge. The court refused to do either. Mr. Sherer appeals his conviction of criminal solicitation to commit first degree arson. We hold the court did not err by refusing to disqualify the prosecutor’s office, or by denying the affidavit of prejudice after the court had made a discretionary ruling. We also reject Mr. Sherer’s additional claims of prosecutorial misconduct and ineffective assistance of counsel, and therefore affirm his conviction.

FACTS

A jury convicted Steven F. Sherer of the murder of his wife in 2000. Mr. Sherer's mother-in-law, Ms. Judy Hagel, testified against Mr. Sherer at trial. King County deputy prosecutor Marilyn Brenneman prosecuted the case. At the trial and sentencing, Mr. Sherer cursed at Ms. Hagel.

While in prison at the Washington State Penitentiary in Walla Walla, Mr. Sherer met inmates Johnny Stewart and Andrew Hall. Mr. Sherer commented that he wanted to kill Ms. Brenneman; he also talked about burning down the house of one of the witnesses. Mr. Stewart contacted the King County prosecutor's office and reported the threats.

Mr. Stewart agreed to assist the police investigation of Mr. Sherer. Mr. Stewart did not tell Mr. Hall that he was cooperating with police. The police placed listening devices in Mr. Sherer's cell and overheard Mr. Sherer provide an address to Mr. Hall. Mr. Hall was released from prison shortly after this conversation. The police contacted Mr. Hall upon his release, and he agreed to speak with law enforcement about Mr. Sherer's plan. He then agreed to assist the police with the investigation and to testify against Mr. Sherer.

Mr. Sherer asked Mr. Hall to burn down Ms. Hagel's house, and Mr. Hall agreed to do so. Mr. Hall was to send proof of the completed arson to Mr. Sherer. Mr. Sherer would then pay Mr. Hall with some hidden jewelry.

The police staged the arson at Ms. Hagel's residence. The Bellevue Fire Department then "responded" to the staged fire. The police arranged for the *King County Journal* to publish a fake newspaper article about the arson.

Mr. Hall mailed the fake newspaper article to Mr. Sherer. Mr. Sherer told Mr. Hall that he had received the article, and later agreed to send Mr. Hall information about the jewelry. He sent Mr. Hall a letter that contained directions to the home of Mr. Sherer's mother, and a map of the foundation of the house where the jewelry was supposedly hidden. Law enforcement recovered two of Mr. Sherer's fingerprints from this letter.

Neither law enforcement nor Mr. Hall could locate the jewelry that Mr. Sherer had promised as payment. At police direction, Mr. Hall wrote Mr. Sherer two letters complaining about not finding the jewelry. Mr. Sherer made no response to Mr. Hall, but did tell Mr. Stewart that he had decided to "screw" Mr. Hall regarding the jewelry. Report of Proceedings at 329. The state charged Mr. Sherer with conspiracy to commit first degree arson.

Mr. Sherer was originally charged in King County Superior Court, but venue was changed to Walla Walla County. A King County deputy prosecutor was appointed as a special prosecutor for Walla Walla County.

Mr. Sherer requested that his appointed counsel from King County represent him.

However, she requested that she be paid her regular rates as a King County public defender, rather than the lower Walla Walla County rates. The trial court denied Mr. Sherer's request. Mr. Sherer then filed an affidavit of prejudice against the trial judge. The trial court denied the request for a new judge as untimely. Specifically, the trial court found that the affidavit of prejudice had been filed after a discretionary ruling.

Mr. Sherer next requested that the King County Prosecutor's Office be disqualified from prosecuting the case because Mr. Sherer threatened the deputy prosecutor from the earlier murder case. The court denied that motion as well.

At trial, Ms. Hagel testified about Mr. Sherer's prior conviction for murdering her daughter. She also testified that Mr. Sherer had made outbursts directed against her at the murder trial, and that Ms. Brenneman was the prosecutor on that case.

The jury found Mr. Sherer guilty of criminal solicitation to commit arson in the first degree. This was the third "most serious offense" conviction for Mr. Sherer. He was sentenced to life without the possibility of parole as a third strike offender. He appeals.

ANALYSIS

1. Affidavit of prejudice

Mr. Sherer contends that the court's refusal to appoint counsel from King County was an administrative matter, not an exercise of the court's discretion. Therefore, the trial judge should have honored the affidavit of prejudice.

A litigant may disqualify a trial judge without having to show prejudice. RCW 4.12.040, .050; *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991). But the affidavit of prejudice must be filed before the judge makes a discretionary ruling. *State v. Dennison*, 115 Wn.2d 609, 619, 801 P.2d 193 (1990). Ministerial or administrative matters handled as a matter of right do not require the exercise of discretion and therefore do not waive the right to file an affidavit of prejudice. *See generally State v. Parra*, 122 Wn.2d 590, 597, 859 P.2d 1231 (1993).

Matters regarding the appointment or removal of a particular individual as counsel are within the discretion of the trial court. Here, the trial court made a decision regarding whether a *specific* attorney would be appointed to defend Mr. Sherer. This is a discretionary ruling. Mr. Sherer did not have the right to counsel of his choice. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). The affidavit of prejudice was filed after this ruling and thus was not timely filed. RCW 4.12.050.

2. Ineffective assistance of counsel

Mr. Sherer next claims he received ineffective assistance of counsel at trial because his lawyer failed to object to evidence of Mr. Sherer's prior bad acts.

Effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant is

required to make two showings to demonstrate ineffective assistance of counsel. The defendant must show that his counsel's representation fell below an objective standard of reasonableness based on the totality of circumstances. The defendant must also show that the representation was prejudicial and that there is a reasonable probability that, but for counsel's deficient representation, the outcome of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume counsel's representation was effective. *Id.* at 335.

Here, the State showed that Mr. Sherer was previously convicted of murder and made death threats against deputy prosecutor Marilyn Brenneman. These facts explained how the investigation began and became part of the res gestae of the conspiracy. This evidence gave the jury a complete picture. Under the res gestae exception, evidence of other crimes or bad acts is admissible “to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (quoting *McCormick's Evidence* § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972))). The court properly admitted the prior threat. Thus, counsel's failure to object was reasonable.

“Proof of motive, if relevant, is admissible under ER 404(b).” *State v. Terrovona*, 105 Wn.2d 632, 650, 716 P.2d 295 (1986). The state is generally permitted to offer

evidence of motive for the commission of a crime, even in cases where doing so also may reveal the commission of past crimes or bad acts by the defendant. *Id.* Here, the trial court admitted testimony from Ms. Hagel regarding Mr. Sherer's prior conviction for murder. This testimony specifically included Ms. Hagel's role in providing testimony at the prior murder trial and other evidence of the hostility between her and Mr. Sherer. This testimony demonstrated a prior dispute and evidence of Mr. Sherer's motivation to burn down Ms. Hagel's home. Therefore, the trial court did not abuse its discretion in finding that this evidence was admissible under ER 404(b) as proof of motive.

Because the prior bad acts evidence was admissible at trial, the failure of Mr. Sherer's counsel to object to its admission was not objectively unreasonable. Even if we were to conclude that defense counsel should have made greater efforts to exclude this evidence, Mr. Sherer cannot demonstrate prejudice. Because Mr. Sherer fails to demonstrate either deficient representation or prejudice, we find no basis for his assertion that his defense counsel was ineffective.

3. Disqualification of the King County Prosecutor's Office

Finally, Mr. Sherer contends that the trial court should have disqualified the entire King County Prosecutor's Office. We review the challenge for an abuse of discretion. *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004). A court abuses its discretion when it bases a decision on untenable grounds or untenable reasons. *Id.*

A prosecutor is a quasi-judicial officer who is required to act impartially. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). “If a prosecutor’s interest in a criminal defendant or in the subject matter of the defendant’s case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor’s staff may be disqualified as well.” *State v. Ladenburg*, 67 Wn. App. 749, 751, 840 P.2d 228 (1992).

We are hesitant to disqualify an attorney absent compelling circumstances. *Schmitt*, 124 Wn. App. at 666. A deputy prosecuting attorney does not represent a specific “client” in the traditional sense. So we require an even more rigorous showing to disqualify a deputy prosecuting attorney. *State v. Bland*, 90 Wn. App. 677, 680, 953 P.2d 126 (1998). Prosecutors are not subject to the appearance of fairness doctrine. *See State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Therefore, a defendant must show an actual lack of impartiality to disqualify a prosecutor.

Ms. Brenneman took no part in Mr. Sherer’s prosecution for conspiracy to commit arson. The charges did not involve any of the specific threats made against Ms. Brenneman, but focused on actions against Ms. Hagel.

Mr. Sherer identifies no specific instances of impartiality. The trial court found that the threats against Ms. Brenneman were sufficiently removed from the case that disqualification of the entire prosecutor’s office was not necessary. This finding is

supported by this record. There are tenable grounds to deny Mr. Sherer's motion to disqualify.

Mr. Sherer also provides this court with a statement of additional grounds for review. To the extent that his legal argument is co-extensive with that provided by the direct appeal, these issues are addressed herein. Mr. Sherer also seeks to provide this court with additional evidence not found in the trial record in support of these claims. Because Mr. Sherer did not file a personal restraint petition, we are limited to review of the record established at the trial court. *McFarland*, 127 Wn.2d at 338.

We hold that the trial court properly denied Mr. Sherer's affidavit of prejudice as untimely. The court properly declined to disqualify the entire King County Prosecutor's Office. Finally, we find no basis for Mr. Sherer's claim of ineffective assistance of counsel. We therefore affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Kato, J.

No. 23215-8-III
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Brown, J.